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FILED
MAY 24 1999

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

| | | |
|------------------------------|---|--------------------|
| DONNA CRAIN, et al., |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 96-LM-983 |
| |) | |
| LUCENT TECHNOLOGIES, et al., |) | |
| Defendants. |) | |

**MEMORANDUM OF FEDERAL COMMUNICATIONS
COMMISSION AS AMICUS CURIAE**

The Federal Communications Commission respectfully submits this memorandum as amicus curiae in support of the plaintiffs' motion for reconsideration of the Court's March 10, 1999, order ("ORDER") dismissing the complaint on grounds that the claims were preempted by decisions adopted by the Commission. Although it takes no position on the merits of the claims, the Commission believes that the Court erred in holding that the Commission had preempted those claims.

BACKGROUND

Telephone companies historically have offered services and facilities to the public under tariffs showing the charges and regulations governing their use. As a general rule, the companies have filed tariffs with the FCC offering interstate and foreign service, and with state utility commissions offering intrastate service. 47 U.S.C. 152(b), 203(a). See Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986). Telephone terminal equipment, known commonly as customer premises equipment ("CPE"), typically was bundled into the tariffed service offerings at both levels of regulation, although primarily at the state level, and CPE prices often were

subsidized by monopoly telephone service revenues.

In relatively recent times, the FCC has opened most communications markets to competition, and the market for CPE has been particularly responsive to that opening. Telephone sets and more sophisticated terminals have been available for at least 20 years from many sources other than the telephone companies. In a rulemaking proceeding that was completed just before the entry of the antitrust consent decree that broke up the former Bell System, the FCC decided that CPE should be unbundled and removed from tariff regulation and that telephone companies selling or leasing CPE should do so in a deregulated marketplace environment. Second Computer Inquiry, 77 FCC 2d 384, 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981), aff'd, Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). The Commission concluded that a telephone company "should have the same regulatory status in marketing CPE as any other equipment vendor...." 77 FCC 2d at 446.

In light of the dual federal-state tariffing scheme, the Commission had to preempt some state regulation of CPE in order to make its deregulatory policy effective. If the state agencies continued to require telephone companies to offer CPE under tariff, the FCC's regime as a practical matter could not succeed. The FCC decided to preempt the states from regulating, however, "only to the extent that their terminal equipment regulation is at odds with the regulatory scheme we have set forth." 84 FCC 2d at 103. That regulatory scheme "essentially involves the removal of traditional utility type regulation over CPE, and the requirement that if carriers of the Bell System choose to provide CPE, they do so pursuant to the structure we have prescribed." 88 FCC 2d at 523.

The Commission thus declared that "utility regulation of CPE is contrary to the national

public interest" and that states may not impose such regulation. 88 FCC 2d at 541 n. 34 (emphasis added). But it did not preempt all state law that might apply to the CPE business, and it recognized that some states might choose "to impose additional safeguards to protect their citizens." 88 FCC 2d at 541. The District of Columbia Circuit affirmed the Commission's preemption decision on the assumption that the Commission had ordered that "charges for CPE be completely severed from transmission rates on both federal and state levels," 693 F.2d at 215, and that the states were required only "to remove CPE charges from their tariffs...", 693 F.2d at 214.

This lawsuit, filed more than a decade after the Commission detariffed CPE and placed telephone companies on the same footing as other providers of CPE, challenges leasing practices and contracts under which AT&T and Lucent Technologies, Inc. provide terminal equipment to consumers. It does not seek to subject CPE to tariff regulation at the state level or to rebundle CPE with AT&T's transmission services.

THE FCC'S POSITION ON PREEMPTION

The Commission has no expertise in Illinois law as it might apply to the sale or lease of CPE -- or, indeed, to any other commodity offered on a competitive basis. The Commission therefore takes no position on the merits of the claims, or even on whether the laws invoked by the plaintiffs apply to the sale or lease of CPE. To the extent that those laws would apply generally to the sale or lease of CPE by companies other than telephone companies, however, the FCC has not preempted their application to the telephone companies.

The Commission may preempt state actions that are inconsistent with and would undermine federal policies and orders the Commission has adopted pursuant to its statutory authority.

Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982)(de la Cuesta). The Commission acted within its statutory authority when it required the detariffing of CPE at the federal level; and its preemption of state tariffing was affirmed as necessary to effectuate the federal policy. See Computer & Communications Industry Ass'n v. FCC, 693 F.2d at 214-18.

But the Commission may not justify a broad preemption of state action merely by showing that some state regulation would frustrate its regulatory goals. Rather, the FCC must tailor any preemption order "to preempt only such state regulations as would negate valid FCC regulatory goals." People of California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990). The Commission must express its intention to preempt particular state actions and show that preemption is necessary if its decision is to displace state law. Id. See also de la Cuesta, 458 U.S. at 154. The FCC expressed no such intention and made no such showing with respect to preemption of state regulation of CPE vendors outside the public utility tariffing context.

Indeed, the Commission was careful to state that it was preempting the states "only to the extent that their terminal equipment regulation is at odds with the regulatory scheme we have set forth." 88 FCC 2d at 523 (quoting 84 FCC 2d at 103). And the regulatory scheme it sought to protect from inconsistent state action involved only "the removal of traditional utility type regulation over CPE...." 88 FCC 2d at 523. See also 88 FCC 2d at 541-42 & n.34 ("Our decision does not foreclose state authorities from establishing protections for the benefit of state ratepayers."). The FCC thus preempted state tariff regulation of CPE under public utility statutes; but it did not intend to preempt the application of more general state laws to telephone companies that provide CPE in a competitive market.

Apart from the clear limitations it expressed as to its preemption intentions in the Second Computer Inquiry orders, the Commission in the analogous context of detariffing interexchange services stated explicitly that state consumer protection and contract law would apply after detariffing:

After our policy of complete detariffing has been implemented, carriers ... will be subject to the same incentives and rewards that firms in other competitive markets confront.... Moreover, when [these services] are completely detariffed, consumers will be able to take advantage of remedies provided by state consumer protection laws and contract law against abusive practices.

Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd 20730, 20733 (paras. 4, 5) (1996), review pending, MCI Telecomm. Corp. v. FCC, D.C. Circuit No. 96-1459. Here, too, the Commission intended the carriers to be "subject to the same incentives and rewards" that other firms in competitive markets confront when they offer detariffed CPE -- including "remedies provided by state consumer protection laws and contract law." 11 FCC Rcd at 20733.

This degree of preemption is appropriate to the substantive actions the Commission took in detariffing CPE. The Commission sought to sever the link between communications services, which continued to be dominated by a limited number of carriers, and the sale or lease of CPE, which already had become a marketplace commodity available from such non-telephone company vendors as Radio Shack and Walmart. Unbundling carrier-provided CPE from transmission services, removing it from tariff regulation, and subjecting it to the constraints of the market would protect communications service consumers from the costs of cross subsidizing carrier CPE activities through excessive transmission rates; and these actions also would further CPE

competition itself as carriers vied for customers with non-carriers. As the Commission said, "detariffing of CPE will allow all equipment vendors to compete on an equal basis in responding to market conditions." Second Computer Inquiry, 77 FCC 2d at 446.

Achieving these purposes on a national basis required the preemption of state tariff regulation. A continuation of state tariffing of CPE both would preserve the problems of bundling and possible cross-subsidization and would deter the effective competition that the Commission sought. But preempting generally applicable consumer protection and contract laws was not necessary to achieve those purposes, and, indeed, would have been inconsistent with the Commission's objective of allowing all CPE vendors to compete on an equal basis subject to the same set of constraints and freedoms. Selectively preempting laws that constrain other CPE vendors would have given an advantage to telephone company activities in the CPE market, contrary to the Commission's objective.

It is true that the Commission's implementation of its detariffing decision included some transitional limitations and requirements that constrained the telephone companies -- AT&T in particular -- in their initial offerings of CPE. See Procedures for Implementing the Detariffing of CPE, 95 FCC 2d 1276 (1983). The Commission sought through those actions to ensure that AT&T would not take initial advantage of its dominant CPE position and to determine appropriate accounting arrangements for the transfer of embedded CPE within the Bell System as the divestiture occurred. But the FCC did not prescribe lease rates for CPE; and it made clear that AT&T would be free from even the initial implementing restraints on lease rates after the transition ended (in two years after the divestiture in 1984). 95 FCC 2d at 1300, 1335. The Commission made no determinations with respect to AT&T's lease rates

for CPE after the transition that would be undermined by the maintenance of the plaintiffs' lawsuit.

CONCLUSION

The Court correctly determined that the FCC, in its detariffing decision, "intended to rely on the forces of the market to act as a regulatory tool in the future." Order p. 2. But the Court erred in inferring from this that the Commission also intended to preempt generally applicable state consumer protection and contract laws as applied to AT&T's (and Lucent's) CPE activities. If those laws would apply to non-telephone company vendors of CPE, they should apply equally to AT&T and Lucent.

Respectfully submitted,

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**IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

CHARLES SPARKS and MARGARET LITTLE,
individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

AT&T CORPORATION,

Defendant.

Case No. 96-LM-983

THIRD AMENDED COMPLAINT

COME NOW Plaintiffs, Charles Sparks and Margaret Little, individually and on behalf of all others similarly situated, and for their Third Amended Complaint against Defendant AT&T Corporation ("AT&T"), allege as follows:

FACTS APPLICABLE TO ALL COUNTS

1. Plaintiff Charles Sparks resides in Madison County, Illinois.
2. Plaintiff Margaret Little resides in Alabama.
3. Defendant AT&T is a Delaware corporation with its control group headquarters and residence located at all relevant times in the State of New Jersey, which, at relevant times, provided residential telephone equipment leasing ("Lease Program") to consumers throughout the United States and in the states of Illinois, including Madison County, and Alabama through its operating unit AT&T Consumer Products Division.
4. Defendant AT&T spun off its operating units in 1996 as separate entities, including AT&T Consumer Products Division.

5. After the 1996 spin-off, Lucent Technologies, Inc. ("Lucent"), formerly known as AT&T Consumer Products Division, provided residential telephone equipment leasing to consumers throughout the United States and in the states of Illinois, including Madison County, and Alabama.

6. Lucent is the successor to Defendant AT&T and AT&T Consumer Products in respect to the Lease Program.

7. Defendant AT&T charged Lease Program customers a monthly or quarterly fee for residential telephone equipment leasing.

8. Plaintiffs, as well as the class described herein, have been customers of Defendant AT&T at times relevant hereto, and have been charged for and have paid for residential telephone equipment leasing.

9. Plaintiffs bring this cause of action individually and on behalf of all Class Members defined as follows:

All persons located in the United States who leased a Traditional style rotary dial desk or wall model telephone, a Traditional style touchtone dial desk or wall model telephone, a Princess style rotary dial telephone, a Princess style touchtone dial telephone, a Trimline style rotary dial desk or wall model telephone, or a Trimline style touchtone dial desk or wall model telephone before January 1, 1984, and continued to lease such telephone during any portion of a year since January 1, 1986. Excluded from the class is any trial judge who may preside over this cause.

10. This action meets all the requirements for class action certification in that:

- i. The class is so numerous as to make joinder impracticable. The class consists of several million residential subscribers in the United States including the State of Illinois
- ii. Common questions of law and fact predominate over any questions affecting only individual members;
- iii. Plaintiffs is committed to protect the rights of the class vigorously, and will protect the interests of the Class fairly and adequately;

- iv. A class action is an appropriate method for the fair and efficient adjudication of this controversy.

COUNT I

(Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trade Practices Act.)

11-20. Plaintiffs and Class Members incorporate paragraphs 1 through 10 by reference, as though fully set forth herein.

21. From January 1, 1986, and continuing to January 20, 2000, Defendant AT&T, by and through its agents and successors using the AT&T name and logo, engaged in unlawful ongoing schemes and courses of conduct that induced Plaintiffs and Class Members, especially the elderly and disabled, to pay for the lease of residential telephone sets through one or more of the following unconscionable, unfair and deceptive acts and practices:

- a. Collecting unconscionably high rental charges for (1) used, refurbished, reconditioned, obsolete, non-functioning, and/or malfunctioning telephone equipment that had little or no monetary value and/or (2) related services that had little or no monetary value;
- b. Failing to adequately disclose to Plaintiffs and Class Members the total dollar amount that they had paid to Defendant AT&T and its successor Lucent under the Lease Program and that the total amount far exceeded the actual value of the telephone equipment and related leasing services;
- c. Failing to adequately disclose and explain to Plaintiffs and Class Members the material terms, conditions, limitations, exclusions, and rights and obligations under the Lease Program;
- d. Failing to adequately disclose to Plaintiffs and Class Members the original cost or current value of the telephone equipment;
- e. Failed to adequately disclose to Plaintiffs and Class Members that there were meaningful alternatives available to them in lieu of continuing to make lease payments;

- f. Failing to adequately disclose to Plaintiffs and Class Members that participation in the Lease Program was not required in order for Plaintiffs and Class Members to continue to receive regular utility telephone service;
- g. Failing to adequately disclose to Plaintiffs and Class Members that the charges appearing on their bills for "leased equipment" were for residential telephones;
- h. Failing to adequately disclose to Plaintiffs and Class Members their right and option to terminate the rental agreement at will;
- i. Representing that replacement telephones provided under the Lease Program were original and/or new when they were, in fact, reconditioned, used, refurbished, and/or second-hand telephones;
- j. Collecting charges for residential telephone leasing in advance and retaining the interest earned on such charges and depriving Plaintiffs and Class Members of the interest they would have earned;
- k. Failing to adequately disclose to Plaintiffs and Class Members material changes in the terms, conditions, exclusions, and limitations under the Lease Program;
- l. Failing to adequately disclose to Plaintiffs and Class Members that by using or retaining leased telephone equipment that they (1) accept and are bound by the terms, conditions, exclusions, and limitations under the Lease Program and/or (2) accept and are bound by material changes to the terms, conditions, exclusions, and limitations under the Lease Program;
- m. Representing to Plaintiffs and Class Members that they would be provided with certain conveniences and services through AT&T Phone Center Stores, including but not limited to, repair service for rented equipment, exchanges of leased equipment for new equipment, payment of monthly bills, and information regarding AT&T telephones, and then depriving Plaintiffs and Class Members of the promised conveniences and services by closing all AT&T Phone Center Stores.

22. The facts which Defendant AT&T misrepresented or concealed as alleged in the preceding paragraph, concerned the kind of information upon which Plaintiffs and Class Members would be expected to rely in making a decision whether to lease or continue to lease residential telephone equipment.

23. The facts which Defendant AT&T misrepresented or concealed were material to Plaintiffs' and Class Members' decision about whether to pay for or continue to pay for residential telephone leasing.

24. Defendant AT&T's unconscionable, unfair and deceptive acts and practices have resulted in an ascertainable loss of moneys or property to Plaintiffs and Class Members. The maximum monthly charge per telephone during the class period ending January 20, 2000, was \$6.95.

25. Defendant AT&T's unconscionable, unfair and deceptive acts and practices had the capacity to mislead Plaintiffs and Class Members and created a likelihood of confusion or misunderstanding among Plaintiffs and Class Members.

26. Defendant AT&T intended for Plaintiffs and Class Members to pay charges for residential telephone equipment in reliance upon AT&T's unconscionable unfair and deceptive acts and practices regarding the Lease Program.

27. Defendant AT&T's unconscionable, unfair and deceptive acts and practices regarding the Lease Program occurred in the course of conduct involving trade or commerce.

28. Defendant AT&T's unconscionable, unfair and deceptive acts and practices violate the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2 and the Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2.

29. As a direct and proximate result of Defendant AT&T's unconscionable, unfair and deceptive acts and practices, Plaintiff Sparks, Plaintiff Little and each class member has suffered damages in an amount equal to all charges which Defendant AT&T and its successor Lucent have collected from each of them for residential telephone rental from January 1, 1986, through January 20, 2000, as well as other damages which may be established at trial.

30. Plaintiff Sparks' individual claim for all forms of relief is less than \$75,000.00.

31. Plaintiff Little's individual claim for all forms of relief is less than \$75,000.00.

32. All class members' individual claims for all forms of relief are less than \$75,000.00 each.

WHEREFORE, Plaintiffs and Class Members request that the acts and practices of Defendant AT&T be adjudged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2, and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2, , that the Court award compensatory damages, punitive damages, attorneys' fees, costs, pre- and post-judgment interest, and such other relief that this Court deems just and proper.

COUNT II
(Violation of the New Jersey Consumer Fraud Act.)

33-59. Plaintiffs and Class Members incorporate paragraphs 1 through 27 by reference, as though fully set forth herein.

60. Defendant AT&T's unconscionable, unfair and deceptive acts and practices constitute unconscionable commercial practices in violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2.

61-64. Plaintiffs and Class Members incorporate paragraphs 29 through 32 by reference, as though fully set forth herein.

WHEREFORE, Plaintiffs and Class Members request that the acts and practices of Defendant AT&T be adjudged a violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2, that the Court award compensatory damages, treble damages, attorneys' fees, costs, pre- and post-judgment interest, and such other relief that this Court deems just and proper.

COUNT III
(Unjust Enrichment and Restitution of Money Paid.)

65-74. Plaintiffs and Class Members incorporate paragraphs 1 through 10 by reference, as though fully set forth herein.

75. From January 1, 1986 and continuing until January 20, 2000, Defendant AT&T and its successor Lucent billed Plaintiffs and Class Members for residential telephones. The maximum monthly charge per telephone during the class period ending January 20, 2000, was \$6.95.

76. From January 1, 1986 and continuing until January 20, 2000, Plaintiffs and Class Members paid those bills.

77. From January 1, 1986 and continuing until January 20, 2000, Plaintiffs and Class Members paid for residential telephone equipment leasing because of one or more of the following mistakes of material fact:

- a. Plaintiffs and Class Members did not know that Lease Program was optional;
- b. Plaintiffs and Class Members did not know that the Lease Program was not required in order to receive regular utility telephone service;
- c. Plaintiffs and Class Members did not know that the telephones provided under the Lease Program had little or no value;
- d. Plaintiffs and Class Members did not know that they had paid to Defendant AT&T and its successor Lucent many times the original cost and/or current value of the telephone equipment;
- e. Plaintiffs and Class Members did not know that they had the right and option to terminate the leasing agreement at will;
- f. Plaintiffs and Class Members did not know the essential and material terms, conditions, exclusions, and limitations under the Lease Program;
- g. Plaintiffs and Class Members did not know that Defendant AT&T made material changes to the terms, conditions, exclusions, and limitations under the Lease Program;
- h. Plaintiffs and Class Members did not know that there were meaningful alternatives available to them in lieu of continuing to make lease payments;
- i. Plaintiffs and Class Members did not know that the charges appearing on their bills for "leased equipment" were for residential telephones;
- j. Plaintiffs and Class Members did not know that replacement telephones provided under the Lease Program were reconditioned, used, refurbished, and/or second- hand telephones; and/or
- k. Plaintiffs and Class Members did not know that Defendant AT&T had discontinued or was planning to discontinue providing certain conveniences and services, through AT&T Phone Center Stores, promised to Plaintiffs and Class Members under the Lease Program, including but not limited to, repair service for rented equipment, exchanges of rented equipment for new equipment, payment of monthly bills, and information regarding AT&T telephone products.

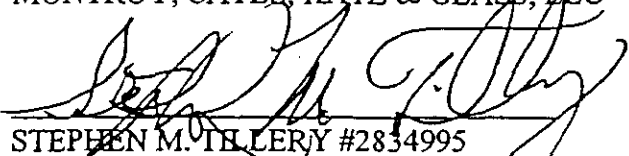
78. As a result of the foregoing mistakes of material fact, enforcement of any contracts for residential telephone leasing between Plaintiffs and Class Members and Defendant AT&T would be inequitable and unconscionable.

79-81. Plaintiffs and Class Members incorporate paragraphs 30 through 32 by reference, as though fully set forth herein.

WHEREFORE, Plaintiffs and Class Members request that the Court rescind their purported contracts for residential telephone leasing and order Defendant AT&T to pay restitution for the money which Defendant AT&T and its successor Lucent have collected from Plaintiffs and Class Members for residential telephone leasing during the period from January 1, 1986, through January 20, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

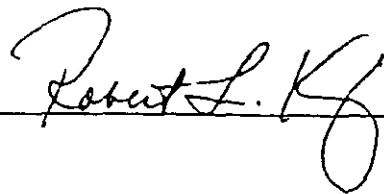
The undersigned certifies that a true copy of the foregoing THIRD AMENDED COMPLAINT was served by enclosing a copy in an envelope addressed to:

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and depositing said envelope in an U.S. Post Office mailbox in St. Louis, Missouri all on this 5th of November, 2001.



BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
Motion of AT&T Corp. and)
Lucent Technologies Inc.)
For a Declaratory Ruling)
To: The Commission)

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OFFICE OF THE SECRETARY

**MOTION OF AT&T CORP. AND LUCENT TECHNOLOGIES INC.
FOR DECLARATORY RULING**

AT&T Corp. ("AT&T") and Lucent Technologies Inc. ("Lucent"), through their attorneys and pursuant to Section 1.2 of the Rules,^{1/} hereby request the Federal Communications Commission ("FCC") to issue a declaratory ruling on the issues stated below regarding the lease of embedded base Customer Premises Equipment ("CPE"). As support for their Motion, AT&T and Lucent state:

1. A substantial and immediate controversy exists with regard to the FCC's primary jurisdiction and preemptive authority over the embedded base CPE which AT&T was assigned at divestiture and which AT&T and Lucent have provided from 1984 to the present, pursuant to *Computer Inquiry II* and its related orders.

2. Five lawsuits are pending against AT&T and Lucent, which purport to be class actions brought on behalf of customers who have leased embedded base CPE at any time since 1984. Four of these cases are consolidated in Multidistrict Litigation proceedings in the

^{1/} 47 C.F.R. §1.2

United States District Court for the Southern District of Alabama, before the Honorable Judge Charles Butler, Jr. *In Re Residential Telephone Lease Program Contract Litigation*, MDL No. 1165, Master Docket No. 97-0309-CB-C. The remaining case is before the Circuit Court of Madison County, Illinois. *Crain, et al. v. Lucent Technologies Inc., et al.*, Cause No. 96-LM-983. Each of these cases makes essentially the same allegation - - that AT&T or Lucent have failed to make adequate disclosures to embedded base CPE lease customers of the fact that they are leasing telephone equipment and that they have the alternative to purchase telephone equipment. In connection with this allegation, the plaintiffs in these cases assert that embedded base CPE rates are excessive and that AT&T or Lucent have misled customers by inadequately informing them it is less expensive to buy a telephone than to lease over the long term.

3. The precise issues raised in these cases have been addressed by the FCC in its *Computer Inquiry II* orders and in informal proceedings initiated in 1995 by the United Homeowners' Association, the Grey Panthers, and other groups. *See Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services*, 77 FCC2d 384 (1984), *aff'd sub nom., Computer & Communications Industry Ass'n v FCC*, 693 F2d 198 (D.C. Cir. 1982); *In the Matter of Procedures for Implementing the Detariffing of CPE*, 99 FCC2d 354 (1984); *In the Matter of Procedures for Implementing the Detariffing of CPE*, 100 FCC2d 1298 (1985); *In the Matter of Procedures for Implementing the Detariffing of CPE*, 3 FCCR 477 (1988). *See also* 1985 Consumer Advisory by FCC and Federal Trade Commission and CPE Lease Advisory on FCC Web Site (www.FCC.gov). The claims asserted and the relief sought by the plaintiffs in the lawsuits identified above directly conflict with the FCC's prior orders and related actions. As an example, in the Illinois case (*Crain v Lucent Technologies Inc.*), the plaintiffs seek specific injunctive relief which would require re-polling of all embedded

base CPE lease customers to see whether they want to continue leasing or to buy a telephone (this was previously done at the FCC's direction in the 1983-1984 timeframe; *see, e.g.*, 95 FCC2d at ¶¶ 11, 67, 69, 126, 131, and Appendix B at ¶¶ 3, 5). The plaintiffs also seek a judicial determination as to the appropriate rates for embedded base CPE in the State of Illinois only, from 1984 to the present (although the FCC specifically set national rates during the price predictability period of 1984-1985, expressly determined that rates should be constrained only by the action of the competitive market thereafter, and left open the option to involve itself with embedded base CPE issues after 1985; *see, e.g.*, 95 FCC2d at ¶¶ 11, n. 15, 24, 71, 78-79, 1415; 100 FCC2d 1298 at ¶ 16).

4. In both the Illinois case and the consolidated MDL cases before the Alabama federal court, AT&T and Lucent have filed motions for judgment on the pleadings. AT&T and Lucent have argued that the FCC has primary jurisdiction and preemptive authority with regard to the sorts of embedded base CPE notifications and rates already dealt with by its *Computer Inquiry II* orders. The motion is under submission to the Alabama federal court. In the Illinois case, the Circuit Court entered its order on March 10, 1999, granting AT&T's and Lucent's motion for judgment on the pleadings and dismissing the case. In that order, the court left open the possibility that the plaintiffs could bring a complaint to the FCC. The Illinois plaintiffs have moved for reconsideration of that order, asking the court either to hold that their claims are not preempted or, alternatively, to refer the preemption issue to the FCC under the primary jurisdiction doctrine. Furthermore, one of the federal MDL cases in Alabama was filed by the same attorneys representing the plaintiffs in the Illinois action. However, directly contrary to their position in Illinois that the FCC and federal courts have no authority over embedded CPE,

the plaintiffs attorneys argue in the Alabama MDL proceeding that that the same allegations give rise to a federal claim under section 207 of the Federal Communications Act.

5. AT&T and Lucent understand that the FCC will seek leave this date to file an *amicus curiae* brief in the Illinois lawsuit, taking the position that the FCC has not preempted all state contract and consumer protection laws with regard to CPE generically. While AT&T and Lucent would not necessarily disagree with that broad position, it does not address the particular question of the preemptive effect of the FCC's previous orders concerning embedded base CPE in light of the specific claims raised by the plaintiffs in these cases. Further, the FCC's expected *amicus* filing is based solely on *ex parte* solicitation by plaintiffs' attorneys in the Illinois case rather than a full and fair consideration of the relevant issues based on information and argument from all of the parties to the case.

6. Based on the foregoing and the particular matters raised in the lawsuits identified above, there is a real, immediate, and substantial controversy which is ripe and appropriate for determination by the FCC, concerning the following question: Does the FCC have primary jurisdiction and preemptive authority with regard to matters involving the embedded base CPE assigned to AT&T in 1984 and provided by AT&T and Lucent thereafter and, if so, to what extent?

7. The FCC has authority to entertain this Motion and to consider the question presented under 47 C.F.R. §1.2 and 5 U.S.C. §504.

8. As further support, AT&T and Lucent will promptly provide to the Commission copies of all relevant papers filed in the above-identified cases and stand prepared to provide such additional information as the FCC may request.

WHEREFORE, AT&T Corp. and Lucent Technologies Inc. respectfully request the Commission to examine and provide its declaratory ruling on the question of its primary jurisdiction and preemptive authority regarding embedded base CPE and in particular with respect to the claims asserted by plaintiffs in the above-identified cases, as stated above, and for such other and further relief as the Commission deems just and proper.

Respectfully submitted,

AT&T Corp.
Lucent Technologies Inc.

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Date: May 24, 1999

CERTIFICATE OF SERVICE

I, Vanessa I. Hicks, a secretary in the law firm of Bryan Cave LLP, do hereby certify that a copy of the foregoing "Motion of AT&T Corp. and Lucent Technologies Inc." was mailed, postage prepaid, this 24th day of May 1999 to the following:

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